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SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 27, Original

STATE OF OHIO, - - - - - - - Plaintiff,

versus

COMMONWEALTH OF KENTUCKY, - Defendant.

BRIEF OF KENTUCKY IN RESPONSE TO REPLY BRIEF OF OHIO TO EXCEPTIONS AND MOTION FOR LEAVE TO FILE

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SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 27, Original

STATE OF OHIO - - - - - *Plaintiff,*

v.

COMMONWEALTH OF KENTUCKY - - *Defendant.*

MOTION FOR LEAVE TO FILE BRIEF

Defendant Commonwealth of Kentucky moves the Court for leave to file BRIEF OF KENTUCKY IN RESPONSE TO REPLY BRIEF OF OHIO TO EXCEPTIONS, sixty (60) copies of which are tendered herewith, and as grounds states:

1. This original action is a controversy over the entire boundary between two sovereign states.

2. The current submission to the Court on Exceptions to the Report of the Special Master is in such a posture that it should resolve the controlling legal principles, and may dispose of the entire case.

3. The brief tendered is actually in the sequence and nature of a reply brief, and is essential to a proper understanding of Kentucky's position on matters raised in Ohio's brief. In the decisive posture of this case, the Court and parties should have the benefit of such a brief which the rules authorize as a matter of

course on appeals and writs of certiorari. Supreme Court Rule 41(3).

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 27, Original

STATE OF OHIO, - - - - - *Plaintiff,*

v.

COMMONWEALTH OF KENTUCKY, - - *Defendant.*

BRIEF OF KENTUCKY IN RESPONSE TO REPLY BRIEF OF OHIO TO EXCEPTIONS

QUESTIONS PRESENTED

Whether the Boundary Between Kentucky and Ohio Is the Low-Water Mark on the Northerly Side of the Ohio River as it Existed in 1792 or the Prevailing Low-Water Mark on the Northerly Side Under I) Principles of River Boundaries, and II) Principles of Acquiescence.[1]

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[1]Kentucky accepts Ohio's assertion that the Special Master neither made nor intended to make any finding as to the effect of the dams. Since it appears the only purpose of Section II of Ohio's Brief (pp. 20-22) was to establish that point, that Section is not an issue before the Court.

ARGUMENT

I

The Ohio River Itself at the Prevailing Low-Water Mark[2] on the Northerly Side is the Boundary Between Kentucky and Ohio; Indiana v. Kentucky Determined a Land Boundary Along an Abandoned Channel and Is Inapposite.

Ohio consumes a major portion of its brief with its obsession that *Indiana* v. *Kentucky,* 136 U. S. 479 (1890), fixed the now long-obscured 1792 location of the northerly low-water mark as Kentucky's boundary along the entire Ohio River. As the following discussion of the Court's opinion demonstrates, that view is erroneous.

The Contentions:

The competing contentions of Kentucky and Indiana in that case are tersely stated on the first page of the Court's opinion and are, in full, 136 U. S. at 503:

> Kentucky alleges that when she became a State on the 1st of June, 1792, this tract was an island in the Ohio River, and was thus within her boundaries, which had been prescribed by the act of Virginia creating the District of Kentucky. The territory assigned to her was bounded on the north by the territory ceded by Virginia to the United States. The tract in controversy was then and has

[2]Kentucky contends the boundary is the present or current northerly low-water mark as it may exist at any given time as affected by the processes of accretion and erosion. For brevity this boundary will be referred to in this brief simply as the "prevailing low-water mark."

ever since been called Green River Island. Kentucky founds her claim to its possession and to jurisdiction over it upon the alleged ground that at that time the river Ohio ran north of it, and her boundaries extended to low-water mark on the north side of the river; also upon her long undisturbed possession of the premises, and the recognition of her rights by the legislation of Indiana.

Indiana rests her claim also upon the boundaries assigned to her when she was admitted into the Union on the 11th of December, 1816, of which the southern line was designated "as the river Ohio from the mouth of the Great Miami River to the mouth of the Wabash." This boundary, as she alleges, embraces the island in question, she contending that the river then ran south of it, and that a mere bayou separated it from the mainland on the north.

The Law:

The Court then analyzed the legal history of the northern boundary of Kentucky along the Ohio River, including the cession of Virginia, an 1810 Kentucky statute legislating the northwest side of the river as the boundary, the holding in *Handly's Lessee* v. *Anthony,* 18 U. S. (5 Wheat.) 374 (1820), that the low-water mark of the river itself on the northwest side is the boundary, and Kentucky decisions following the holding in *Handly's Lessee,* 136 U. S. at 503-507. The Court quoted from *McFall* v. *Commonwealth,* 59 Ky. (2 Metc.) 394 (1859) in which Kentucky's highest court stated:

> That *the boundary and jurisdiction of the State of Kentucky rightfully extend to low-water mark*

> *on the western or northwestern side* of the river Ohio must now be considered as settled. 136 U. S. at 507 (emphasis added).

In concluding its discussion of the law, the Court stated that Kentucky's boundary rights could not be affected "by the fact that the channel in which the river once ran is now filled up." Following *Missouri* v. *Kentucky,* 78 U. S. (11 Wall.) 395 (1871), the Court held that the principle which must control under the facts of *Indiana* v. *Kentucky* was "precisely that" which would control if the river's waters so departed "from its ancient channel as to leave on the opposite side of the river entire counties of Kentucky." This principle is that the abandonment of a river channel will not affect the location of a boundary defined by the original channel. *Missouri* v. *Kentucky, supra,* at 401. Rather, as stated in *Indiana* v. *Kentucky,* such boundary will continue "unaffected by the action of the forces of nature upon the *course* of the river." 136 U. S. at 508 (emphasis added).

The Issue:

The Court then stated the determinative issue in the case as follows:

> *The question then becomes one of fact,* did the waters of the Ohio pass between Green River Island and the mainland of Indiana when Kentucky became a State and her boundaries were established? 136 U. S. at 509 (emphasis added).

The Facts and Decision:

After extensive and detailed analysis of the facts, the Court found that the waters did pass in that channel when Kentucky became a state and that the boundary must run on the line of the northerly low-water mark of that channel as nearly as it could be ascertained after the channel had been filled.

What Was and Was Not Decided in Indiana v. *Kentucky:*

The opinion in *Indiana* v. *Kentucky* discussed the two basic principles relating to streams as boundaries. The first — that the boundary usually follows the stream itself — was discussed with approval in regard to *Handly's Lessee* v. *Anthony,* 18 U. S. (5 Wheat.) 374 (1820). The second — that abandonment of a channel does not change a river boundary — as applied in *Missouri* v. *Kentucky,* 78 U. S. (11 Wall.) 395 (1871), was "precisely that" which governed at Green River Island. *Indiana* v. *Kentucky* is therefore nothing more nor less than an application of the principle that the forces of nature which effect abandonment of a channel do not change the boundary.

The decision in *Indiana* v. *Kentucky* was restricted to fixing a boundary on dry land along the filled Green River Island channel. The opinion discussed no issue as to any change in the low-water mark between the time Kentucky became a state in 1792 and the time Indiana became a state in 1816. Clearly, no such issue was decided. The core issue in that original action was not even an issue of law but rather of fact, i.e., whether

the waters of the Ohio flowed in the channel north of Green River Island when Kentucky became a state in 1792. The only significance of when Kentucky became a state was that the island was then within its domain. That domain could not be divested through nature's subsequent change in the river's course by filling of the channel before Indiana became a state in 1816.[3] In other words, simply put, as between these two times the factual situation at the time Kentucky became a state controlled. Thus, the Court ruled that the Green River Island boundary line must run on the northerly low-water mark of the channel, now abandoned, which had existed when Kentucky became a state in 1792.

How Indiana v. *Kentucky and Handly's Lessee* v. *Anthony Have Been Applied by the Respective States:*

The universally accepted principle that the boundary follows the stream, recognized in *Handly's Lessee*

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[3]The abandoned-channel principle is twisted by Ohio to mean that *no* change in the river since 1792 could change the boundary. Ohio's misunderstanding is at odds with the universally accepted principle that changes in a boundary stream *do* change the boundary when the stream remains in its original channel. See *Arkansas* v. *Tennessee,* 246 U. S. 158 (1918); *Nebraska* v. *Iowa,* 143 U. S. 359 (1892).

It is clear from the context that "the action of the forces of nature upon the course of the river," in the Court's opinion in *Indiana* v. *Kentucky,* 136 U. S. at 508, refers to abandonment of a channel and not to changes in the original channel. In *Missouri* v. *Kentucky,* 78 U. S. (11 Wall.) 395 (1871) at 401, cited for the "precisely" controlling principle in *Indiana* v. *Kentucky,* that principle is stated in this way (we have supplied facts from *Indiana* v. *Kentucky* in brackets):

> "If the river has subsequently *turned its course,* and now runs east [south] of the island [tract], the status of the parties to this controversy is not altered by it, for the channel which the river *abandoned* remains, as before, the boundary between the States and the island [tract] does not, in consequence of *this* action of the water, change its owner." (emphasis added).

v. *Anthony,* applies to Kentucky's Ohio River boundary, in the absence of a channel change as at Green River Island. Consistent application of this principle is documented in the histories of Kentucky, Indiana and Ohio, set out below,[4] over almost a century preceding this Court's decision in *Indiana* v. *Kentucky* and almost a century following it. The low-water mark boundary is the prevailing low-water mark under this principle, and none of the many authoritative references to the river or low-water mark as the boundary suggests a 1792 mark.

Application in This Case:

Thus, Ohio's construction of *Indiana* v. *Kentucky* misconstrues the Court's opinion, defies legal principle and precedent, and is refuted by almost two centuries of history surrounding Kentucky's northern boundary. The applicable rule rejects Ohio's contention and places Kentucky's boundary with Ohio along the Ohio River at the prevailing low-water mark on the northerly side.

II

For Almost Two Centuries Kentucky, Ohio and Indiana Have Treated the Prevailing Northerly Low-Water Mark as Their Boundary Along the Ohio River; the Doctrine of Acquiescence Precludes Retroactive Fixing of an Artificial Mark at a Presumed 1792 Level.

Ohio insists that Kentucky has acquiesced. To the contrary, it is Ohio that has acquiesced in the prevailing low-water mark as the boundary.

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[4] *Infra,* pp. 10-12.

Kentucky has always asserted dominion to the prevailing low-water mark on the northerly side. The first recorded history of its assertions is the 1810 legislative enactment referred to in *Ohio* v. *Kentucky,* 410 U. S. 641, 650 (1973). Since then, in an unbroken line of decisions, Kentucky's highest court has recognized the northerly low-water mark boundary.[5] *See Commonwealth* v. *Henderson Co.,* 371 S. W. 2d 27 (Ky. 1963); *Louisville Sand & Gravel Co.* v. *Ralston,* 266 S. W. 2d 119 (Ky. 1954); *Shannon* v. *Streckfuss Steamers,* 279 Ky. 649, 131 S. W. 2d 833 (1939); *City of Covington* v. *State Tax Commission,* 231 Ky. 606 21 S. W. 2d 1010 (1929); *Willis* v. *Boyd,* 224 Ky. 732, 7 S. W. 2d 216 (1928); *Bedford-Nugent Co.* v. *Herndon,* 196 Ky. 477, 244 S. W. 908 (1922); *Nicoulin* v. *O'Brien,* 172 Ky. 473, 189 S. W. 724 (1916), *aff'd.,* 248 U. S. 113 (1918); *Ware* v. *Hager,* 126 Ky. 324, 103 S. W. 283 (1907); *Commonwealth* v. *Louisville & E. Packet Co.,* 117 Ky. 936, 80 S. W. 154 (1904); *Meyler* v. *Wedding,* 107 Ky. 310, 53 S. W. 809 (1899), *rev'd. on other grounds,* 192 U. S. 573 (1899); *Louisville Bridge Co.* v. *City of Louisville,* 81 Ky. 189, 5 Ky. L.R. 16 (1833); *Berry* v. *Snyder,* 66 Ky. (8 Bush.) 266 (1867); *Spalding* v. *Simms,* 61 Ky. (4 Metc.) 285 (1863); *McFall* v.

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[5]The northerly low-water mark referred to in these decisions necessarily means the prevailing low-water mark under the universally accepted principle that the boundary follows the stream in its original channel. See *Arkansas* v. *Tennessee,* 246 U. S. 638, 647, 648 (1918); *Nebraska* v. *Iowa,* 143 U. S. 359, 361-62 (1892); *Berry* v. *Snyder,* 66 Ky. (3 Bush.) 266, 279 (1867).

Ohio cites *Perks* v. *McCracken,* 164 Ky. 590, 184 S. W. 891 (1916) as support for the 1792 mark. Ohio's Reply Brief, p. 26. However, examination of that case shows it is simply an application of the abandoned-channel rule of *Indiana* v. *Kentucky.*

Commonwealth, 59 Ky. (2 Metc.) 394 (1859); *McFarland* v. *McKnight,* 45 Ky. (6 B. Mon.) 500 (1846); *Church* v. *Chambers,* 33 Ky. (3 Dana.) 274 (1835); *Fleming* v. *Kenney,* 27 Ky. (4 J.J. Marsh) 155 (1830).

All of the cases of Ohio's courts referring to the low-water mark boundary are to the same effect. *See Dickow* v. *Cincinnati,* 31 Ohio St. 226 (Hamilton Co. C. P. 1920); *State Board of Health* v. *City of Greenville,* 86 Ohio St. 1, 98 N. E. 1019 (1912); *State of Ohio* v. *Savors,* 15 Ohio C.C.R. (n.s.) 65 (Cir. Ct. Columbiana Co. 1911); *Winifrede Coal Co.* v. *Central Ry. & Bridge Co.,* 11 Ohio Dec. Reprint 35 (Hamilton C. P. 1890); *Newport & Cincinnati Bridge Co.* v. *Commissioners of Hamilton Co.,* 8 Ohio Dec. Reprint 564 (Hamilton Dist. Ct. 1883); *Booth* v. *Shepherd,* 8 Ohio St. 243 (1858); *State* v. *Hoppess,* 1 Ohio Dec. Reprint 105 (Sup. Ct. Ohio, Montgomery Co. 1845); *Lessee of Blanchard* v. *Porter,* 11 Ohio 139 (1841); *Benner's Lessee* v. *Platter,* 6 Ohio 504 (1834); *Lessee of McCullock* v. *Aten,* 2 Ohio 307 (1826).

The same may be said for Indiana courts. *See Memphis & C. Packet Co.* v. *Pikey,* 142 Ind. 304, 40 N. E. 527 (1895); *Welsh* v. *State,* 126 Ind. 71, 25 N. E. 883 (1890); *Sherlock* v. *Alling,* 44 Ind. 184 (1873), *aff'd.* 93 U. S. (3 Otto.) 99 (1876); *Carlisle* v. *The State,* 32 Ind. 55 (1869); *Gentile* v. *The State,* 29 Ind. 409 (1868).

As well as Illinois. *See Joyce-Watkins Co.* v. *Industrial Commission,* 325 Ill. 378, 156 N. E. 346 (1927).

Federal courts in Kentucky and Indiana have described the boundary in the same way as have the state

courts. *See Inland Barge Co.* v. *Nasbitt,* 210 F. Supp. 690 (S.D. Ind. 1962); *Walker* v. *Felmont Oil Corp.,* 136 F. Supp. 584 (W.D. Ky. 1955), *vacated on other grounds,* 240 F. 2d 912 (6th Cir. 1957); *Paducah-Illinois R. Co.* v. *Graham,* 46 F. 2d 806 (W.D. Ky. 1931).

As early as 1859, Kentucky's highest court stated in *McFall* v. *Commonwealth,* 59 Ky. (2 Metc.) 394, 396 (1859),

> That the boundary and jurisdiction of the state of Kentucky rightfully extend to low-water mark on the western or northwestern side of the Ohio River, must now be considered as settled.

No decision of any of these states disputes the matter. The 1943 Compact between Indiana and Kentucky, which fixed their entire boundary along the Ohio River, further illustrates that both states have always regarded the prevailing low-water mark on the northerly side of the Ohio as their boundary in all areas where the river has remained in its original channel. Although Ohio disputes this, it cannot overcome the unmistakable language of the compact which established "the boundary line between the State of Indiana and the Commonwealth of Kentucky by agreement" as the Green River Island survey line of *Indiana* v. *Kentucky* extended by the compact to low-water mark at its upstream and downstream sides, *and* the "low water mark" upstream and downstream "forming the remainder of the boundary line." Kentucky's Brief in Support of Exceptions, Appendix, pp. 35, 36.

Ohio premises its argument against the compact on the dual theory taken from an administrative opinion of the United States Nuclear Regulatory Commission that 1) the States would not so easily overturn *Indiana* v. *Kentucky,* viewed as precedent for a 1792 mark, and that 2) in resolving a matter precipitated by the Green River Island dispute the States would not undertake "to disturb a boundary for hundreds of miles." Ohio's Reply Brief to the exceptions of Kentucky to the Special Master's Report, hereinafter Ohio's Reply Brief, pp. 24-25.

Neither premise is correct. On the first, the abandoned-channel principle of *Indiana* v. *Kentucky,* as we have shown above, is not contrary to the rule that the boundary follows the stream in its original channel, but rather is perfectly consistent with and complementary to it. On the second, given the legal principles and history which existed when the compact was adopted, it did not "disturb" the prevailing low-water mark boundary but rather recognized and confirmed it by enrolling in the legislative records of the two States the same boundary which was already ingrained in the histories of those States and followed with unanimity in their judicial decisions. To do otherwise would have required abnegation of everything that had gone before the compact.

Ohio also argues the 1943 Compact does not evidence Indiana's agreement to the prevailing low-water mark boundary because that interpretation is rejected in the position taken in filings by Indiana's attorney general in *Kentucky* v. *Indiana,* Original No. 81 (Oc-

tober Term, 1978). Ohio's Reply Brief, p. 25. However, the position pleaded by Indiana's attorney general in this Court in 1979 is of no greater significance "at this very late date" than was the pleading of Ohio's attorney general attempting to raise "the middle-of-the-river issue" in *Ohio* v. *Kentucky,* 410 U. S. 641, 649 (1973). As in that case, if the boundary has been established by principle, by acquiescence, or by compact, before Indiana's filing here, the contention in that filing cannot overcome the established boundary.

Nothing in the authoritative history[6] of the three States pertaining to the low-water mark boundary suggests that the boundary is anything other than the prevailing low-water mark as established under the controlling principle that the boundary follows the stream in its original channel.

Ohio contends that Kentucky has acquiesced, but the above decisions of Kentucky's highest court and enactments of Kentucky's legislature show that without exception Kentucky has always claimed the prevailing low-water mark boundary. On the other hand, what response has Ohio made to counter this lengthy history of the prevailing low-water mark as the boundary from the time of the beginning of that history not later than 1810 until the filing of this action? None. Rather, its courts have consistently endorsed that

[6]Considering Kentucky's lengthy and positive legislative and judicial assertions of sovereignty to the prevailing low-water mark, statements relied on by Ohio from an opinion of an assistant attorney general and a report of a service agency of the state's legislature do not and cannot express the sovereign position of the Commonwealth of Kentucky.

And right or wrong, views in such documents have no legal weight and are not binding in a court of law.

boundary. As with the northern half of the river in *Ohio* v. *Kentucky,* 410 U. S. 641, 649 (1973), Ohio has long acquiesced "in the location of its southern border at the northern edge of the Ohio River, and its persistent failure to assert a claim to the" 1792 low-water mark means "it may not raise the . . . issue at this very late date."[7]

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[7]Acceptance of Ohio's position might produce paradoxical results. Considering the phenomenal effects of accretion and erosion on large and active rivers, see *Missouri* v. *Kentucky,* 78 U. S. (5 Wheat.) 374, at 408-411 (1871), it may be assumed that along the Ohio there have been numerous substantial accretions to the shores of Kentucky's bordering states. For instance, the case of *Ellis* v. *Chestnut,* 289 S. W. 2d 741 (Ky. 1956), involved 35 acres which had accreted to the Illinois shore of the Ohio River across from Kentucky. Under the rule that the boundary follows the stream, the Kentucky court held the acreage to be in Illinois and not Kentucky.

Ironically, however, if Ohio's position is adopted, accretions to the *Ohio, Indiana* and *Illinois* shores south of the 1792 low-water mark on the northern side of the river would be in *Kentucky.* This would have far-reaching legal and political effects in such areas and would divest Ohio, Indiana and Illinois of concurrent jurisdiction over the river wherever their shores are so eliminated.

Such a transfer of sovereignty would be bizarre. Carried to its logical conclusion, however, this is where Ohio's argument leads.

CONCLUSION

It makes no difference from which perspective, that of strict legal principle or that of acquiescence, this case is viewed. Under either, the controlling legal principle that the boundary follows the stream, or Ohio's long acquiescence in the lengthy and uninterrupted history of such a view, the boundary between Kentucky and Ohio is the prevailing northerly low-water mark of the Ohio River. Final decree should be entered accordingly.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, James M. Ringo, one of counsel for defendant, a member in good standing of the Bar of the Supreme Court of the United States, hereby certify that on the 27th day of July, 1979, I served the foregoing brief on the Special Master and the plaintiff by depositing in the U. S. Mail, first class postage prepaid, three copies each addressed to Judge Robert Van Pelt, Special Master, 566 Federal Building, Lincoln, Nebraska 68508; Michael R. Szolosi and Steven C. Fitch, Special Counsel to the Ohio Attorney General, Gingery, Palmer & Szolosi, 140 E. Town Street, Columbus, Ohio 43215, and Counsel for the plaintiff Howard B. Abramoff, Assistant Attorney General, 30 East Broad Street, Columbus, Ohio 43215.

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